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HON. MARSHALL FERGUSON
DECEMBER 13, 2019
S. WITHOUT ORAL ARGUMENT

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

GARFIELD COUNTY)
TRANSPORTATION AUTHORITY;)
KING COUNTY; CITY OF SEATTLE;)
WASHINGTON STATE TRANSIT)
ASSOCIATION; ASSOCIATION OF)
WASHINGTON CITIES; PORT OF)
SEATTLE; INTERCITY TRANSIT;)
AMALGAMATED TRANSIT UNION)
LEGISLATIVE COUNCIL OF)
WASHINGTON, and MICHAEL)
ROGERS;)
Plaintiffs,)
v.)
STATE OF WASHINGTON,)
Defendant.)
PERMANENT OFFENSE,)
TIMOTHY DONALD EYMAN, JACK)
FAGAN, and MICHAEL FAGAN,)
Intervenors,)

NO. 19-2-30171-6SEA

**INTERVENORS' MOTION TO APPOINT
OUTSIDE COUNSEL (CR 24)**

I. RELIEF REQUESTED

COME NOW Intervenors PERMANENT OFFENSE, TIMOTHY DONALD EYMAN, JACK FAGAN, AND MICHAEL FAGAN and request that the Court grants Intervenors Motion to Appoint Outside Counsel.

II. STATEMENT OF ISSUES

- A) Is the Washington State Attorney General's Office prejudiced against I-976 Sponsor Timothy Donald Eyman? Yes;
- B) To date, has the Washington State Attorney General's Office competently and diligently defended the constitutionality and legality of I-976 in this matter? No;
- C) Have Attorney General Ferguson and/or Solicitor General Purcell used rhetoric that indicates bias and/or prejudice against I-976 sponsor Tim Eyman? Yes;
- D) Does the combination of the Washington State Attorney General's Office's simultaneous pursuit of legal claims against (for a previous ballot initiative) I-976 sponsor Tim Eyman, while also attempting to defend I-976 against legal attacks, including one on ballot language, create the appearance of a conflict of interest for the AG? Yes;
- E) Is there reason to be concerned that Washington State voters will believe that the AG is biased and/or prejudiced against I-976 and its sponsor Tim Eyman, and therefore, uncapable of competently and diligently defending I-976? Yes;
- F) Should outside counsel be appointed to ensure that the Washington State Attorney General's Office competently and diligently defends the constitutionality and legality of I-976 in this matter? Yes

III. EVIDENCE RELIED UPON

Intervenors base the factual allegations contained herein on the Declaration of Timothy Donald

1 Eymen and the Exhibits attached thereto, and the record contained herein, the Declaration of Jack
2 Fagan, and the Declaration of Michael Fagan.

3 **IV. AUTHORITY**

4 Intervenors bring this Motion pursuant to CR 24, and RPCs 1.1, 1.3, 1.7, and 3.7

5 **V. ARGUMENT**

6 *A. Competence, Diligence, and the Role of the AG and SoS with Ballot Initiatives*

7 Pursuant to RPC 1.1, a lawyer is obligated to provide competent representation to clients;
8 “competence” requires the legal knowledge, skill, thoroughness and preparation reasonably necessary
9 for the representation. RPC 1.1. Moreover, in representing a client a lawyer shall exercise “reasonable
10 diligence and promptness”. RPC 1.3. As discussed in RPC 1.3 Comment 1, this requirement is
11 intended to ensure that:

12 A lawyer... [Pursues] a matter on behalf of a client despite opposition, obstruction or
13 personal inconvenience to the lawyer, and take whatever lawful and ethical measures
are required to vindicate a client’s cause or endeavor. A lawyer must also act with
14 commitment and dedication to the interests of the client and with diligence in advocacy
15 upon the client’s behalf.

16 The Washington State Attorney General’s Office (“AG”) is the largest law firm in the state, despite
17 being a Washington State government agency, operating in Washington State, encompassing over 28
18 divisions and 600 attorneys. “Brief History of the Attorney General”. Office of the Washington State
19 Attorney General, 2019, *available at* <https://www.atg.wa.gov/brief-history-office-attorney-general>
20 (last accessed on December 4, 2019).

21 Clients of the AG include numerous state agencies, including the Washington State Public
22 Disclosure Commission (“PDC”) as well as the Office of the Washington State Secretary of State
23 (“SoS”), and directly and/or indirectly, the citizens of Washington State, The PDC is tasked with
24 enforcing campaign finance laws and regulations in Washington with the SoS, among other roles,
25

orchestrates popular elections, including administering the submission of ballot initiatives and
referendums, and ensuring their compliance with applicable laws and regulation. Ballot initiatives may
be submitted by registered Washington State voters, also known as a “Sponsor”, to the SoS; the
proposed initiative is, assuming submission requirements are fulfilled, subsequently submitted to the
AG who then drafts the ballot language to describe the effects and/or intention of the initiative. The
language generated by the AG may be appealed by the Sponsor.

In the event that a ballot initiative successfully qualifies for the ballot, and is subsequently
approved by voters, depending on its effectiveness date, it becomes Washington State law.
Nonetheless, despite a majority of voters approving a ballot measure, parties may file a legal challenge
against the ballot initiative by claiming that it is not constitutional and/or otherwise not legal. In the
event such a legal challenge occurs, the AG is tasked with defending the constitutionality and
legality of the voter approved ballot initiative, representing the State of Washington and/or the citizens
of Washington State, ideally in a manner compliant with the Washington State Rules of Professional
Conduct. Similarly, the AG is also tasked in bringing and litigating enforcement actions against parties
when the PDC refers such an action to them for purported campaign finance violations.

B. Washington State Ballot Measure I-976 and Tim Eyman

Early last month, Washington State voters approved Ballot Initiative 976 (“I-976”). I-976 was
sponsored and promoted by Timothy “Tim” Donald Eyman (“Eyman”). As discussed in the
Declaration of Timothy Donald Eyman, for over two decades, Eyman, a political activist and
Intervenor in this matter, has sponsored and promoted ballot initiatives intended to increase state
government accountability and transparency, and limit the amount of taxes and fees of imposed by
state and local government(s) on Washington State citizens.

I-976 is intended to reduce Washington State’s notorious annual “car tab” fees to a flat amount

1 of \$30.00; the fees are required annually for Washington State citizens who own and operate motor
2 vehicles order to register them in Washington State. Washington State voters approved I-976 with
3 53% of the vote. Over the past two decades, Washington State voters have repeatedly approved similar
4 ballot initiatives sponsored by Eyman, however, these initiatives have repeatedly faced legal
5 challenges with varying levels of success resulting in them being completely and/or partially
6 overturned. Moreover, the Washington State Legislature as well as local governments have enacted
7 legislation and ordinances that have essentially nullified the provisions contained within the ballot
8 initiatives intended to limit taxes and increase government accountability and transparency.

9 Besides the car tab fees issue that is addressed by I-976, Eyman has sponsored and promoted
10 numerous other ballot initiatives over the years, and is one of the most prominent political activists in
11 Washington State. Eyman has raised millions of dollars to fund the campaigns and committees to
12 support the ballot initiatives, and his political activities routinely attract the attention of statewide, and
13 sometimes, even national media. While the ballot initiatives supported by Eyman have attracted a
14 great deal of support, they also have attracted a great deal of opposition, particularly from elected
15 officials and organizations affiliated with the Washington State Democratic Party (“Democrats”,
16 “Democrat”, and “Democratic”, used interchangeably).

18 A false narrative about Eyman has been widely used by opponents to undermine Eyman’s
19 support of ballot initiatives, and even harass Eyman as well as his family. This narrative
20 disingenuously and falsely claims that Eyman sponsors and promotes ballot initiatives for the purpose
21 of enriching himself, and that voters should automatically assume that the ballot initiatives with which
22 he is associated were introduced for this purpose. Because of this, Eyman is routinely derided and
23 ridiculed by Democrat-oriented elected officials, organizations, pundits, and the media. Despite the
24 dishonest and disingenuous nature of this effort to undermine Eyman, it has largely been successful: It
25

1 caused Eyman significant difficulty in successfully sponsoring and promoting ballot initiatives despite
2 having a constitutional and legal right to do so.

3 At least partially due the above discussed false narrative and/or perceived image, in Eyman’s
4 activities have also attracted the attention of the PDC as well as the AG, both of which have
5 sometimes found themselves under political pressure from elected officials to investigate Eyman.
6 Eyman presently is dealing with a campaign finance violation lawsuit in Thurston County Superior
7 Court that was filed in March 2017; when announcing this lawsuit Attorney General Bob Ferguson
8 (“Ferguson”) took the initiative to call the ballot initiatives that Eyman sponsors and promotes “self-
9 serving”.

10 Less than a year before announcing that lawsuit, Ferguson proudly proclaimed that, “No one is
11 above the law – that includes Tim Eyman” after a superior court judge ordered Eyman to release
12 financial records to the AG. Based on this rhetoric alone it is clear that Ferguson as well as the AG
13 have an antagonistic relationship with Eyman. This is particularly true given the above discussed
14 lawsuit between the AG and Eyman, and now, claims arising from this suit that were filed by the AG
15 against Eyman in his Chapter 11 bankruptcy case before the United States Bankruptcy Court for the
16 Western District of Washington. The lawsuit is what led to the bankruptcy filing; the combination of
17 the two led to Eyman separating from his wife of many years in December 2008.

18 *C. Plaintiffs’ Legal Challenge to I-976 and a Lack of a Competent and Diligent Defense*

19 As discussed, in November 2019, Washington State voters approved the passage of I-976. On
20 November 13, 2019, a coalition of local governments, organizations and individuals (“Plaintiffs”) filed
21 this lawsuit in King County Superior Court contesting the constitutionality and legality of I-976.
22 Shortly thereafter, Plaintiffs filed a Motion for a Preliminary Injunction (“Motion”) to block I-976
23 from taking effect on December 5, 2019. The Motion was granted on November 26, 2019 by this court
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1 primarily on the grounds that ballot language for I-976 may have been likely to have caused voter
2 confusion.

3 Following the filing of this lawsuit, the AG began its now ongoing effort to defend the
4 constitutionality and legality of I-976 from Plaintiffs' legal challenge. Despite having a duty to defend
5 I-976 and zealously defend its constitutionality and legality, the AG has failed to take a number of
6 actions in purportedly doing so that call into question the AG's ability to do so and/or intentions. King
7 County is the most populous county in Washington State, and consequently, plays a very significant
8 role in Washington State politics. As one of the three counties that make up the Central Puget Sound
9 Regional Transit Authority ("Sound Transit") Transportation Benefit District¹, I-976 would likely
10 have a disparate impact on King County compared to other counties in Washington State. King
11 County voters overwhelmingly rejected I-976 with over 59% of voters rejecting it.²

12 Despite I-976's disparate impact on King County, the AG repeatedly refused inquiries from
13 sponsors and supporting taxpayers of I-976 who recommended changing the venue where this matter
14 is being heard in order to ensure impartiality. Moreover, despite being informed that Judge Marshall
15 Ferguson was appointed as King County Superior Court Judge by Governor Jay Inslee, the most
16 prominent elected official opposing I-976, and had a Democrat affiliation, the AG declined to file an
17 Affidavit of Prejudice against Judge Ferguson. Similarly, the AG has knowingly failed to raise legal
18 issues about the standing of Plaintiffs to challenge constitutionality and legality of I-976 as well as a
19 preliminary injunction requiring a bond in their opposition to Plaintiffs' Motion for a Preliminary
20 Injunction, despite, again, being informed of the issues. At the November 26, 2019 hearing for the oral
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24 ¹ The two other member counties are Pierce Counties and Snohomish County.
25 ² 34 of Washington State's 39 counties approved I-976. The counties that rejected I-976 were Island County, Jefferson
County, King County, San Juan County, and Thurston County.

1 arguments of Plaintiffs' Motion, the attorney(s) from the AG were unprepared and could not even
2 answer basic questions about I-976, including what sections of the initiative did.

I-976 sponsor and promoter Eyman attended the November 26, 2019 hearing for Plaintiffs',
and repeatedly attempted to raise the concerns discussed above to Deputy Solicitor General Copsey as
well as Solicitor General Noah Purcell. However, as had happened previously, the AG via Copsey and
Purcell ignored Eyman's discussion of these issues. Moreover, both Attorney General Ferguson and
Solicitor General Purcell derided Eyman's attempts encourage the AG to competently and diligently
defend I-976, with Ferguson stating, "As my solicitor general, Noah Purcell, said yesterday, Tim
Eyman's outburst in court was wildly inappropriate, and it hurt our chances of successfully defending
the people's initiative". As the Court is aware, on November 27, 2019, the Court granted Plaintiffs'
Motion for a Preliminary Injunction, specifically claiming that the ballot language for I-976 may have
caused voter confusion. As discussed, the AG drafted the ballot language.

Following the Court’s granting of Plaintiffs’ Motion, Intervenor Eyman repeatedly requested
14 that the AG file a Motion for Reconsideration of the Court’s granting of Plaintiffs’ Motion. However,
15 these repeated requests for such a Motion were ignored. Instead, on December 2, 2019, the AG filed
16 its Emergency Motion for Stay Pending Review with the Washington State Supreme Court. While this
17 Motion assuaged the Intervenors’ concerns that the AG’s emergency motion to the Washington State
18 Supreme Court would result in a ruling on I-976 without discovery, for the above discussed reasons,
19 the AG’s defense of I-976 has been less than “ideal”, and from the Intervenors’ standpoint, may not
20 have been fully compliant with RPC(s) 1.1 and 1.3.
21

D. Appearance of Conflicts of Interest

As discussed, Intervenor Eyman and the AG presently do not have a positive relationship. The ongoing lawsuit by the AG (on behalf of the PDC) against Eyman, and claims filed against Eyman in

his personal bankruptcy, have cost Eyman thousands of dollars, and caused him significant stress.
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Moreover, the ballot language for I-976, which was drafted by the AG despite Eyman contesting it, is
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not only one of the main components of Plaintiffs' claim that I-976 is illegal and unconstitutional, but
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apparently also now the primary reason for the Court granting the Plaintiffs' Motion for a Preliminary
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Injunction blocking the enforcement of I-976.
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Under the above referenced RPCs, lawyers are prohibited from representing clients with
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conflicting interests in a variety situation. Moreover, under RPC 3.7, lawyers are prohibited from
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advocating in a matter in which they are likely to be called as a witness. Here, we have a unique
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situation in which the AG is pursuing legal claims against I-976 sponsor and Intervenor Eyman on
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behalf of the PDC for issues with a previous ballot initiative campaign while also defending the
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legality and constitutionality of I-976 in a separate lawsuit. Meanwhile in the latter lawsuit, a
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preliminary injunction was recently granted primarily on the grounds that ballot language drafted by
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the office defending I-976 (AG) may cause voter confusion, thereby, possibly making I-976
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unconstitutional.
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This situation of differing interests and parties creates the image of a conflict of interest for the
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AG to have an "iron" in so many "fires". The interests of the PDC and SoS are separate and distinct:
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Whereas the PDC is concerned with enforcing campaign finance laws and regulations, the SoS, for the
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purposes of this matter, is concerned with administering elections and encouraging democracy and
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voting within Washington State. While the AG pursuing PDC legal claims against the sponsor of a
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ballot initiative that it is defending on behalf of Washington State voters may appear at first glance to
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be a conflict of interest, it is not. Nonetheless, when one factors in the role of the AG in drafting the
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purportedly unconstitutional ballot language for I-976, and a well-documented recent history of
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animosity between the AG and the sponsor of the ballot initiative, at minimum, the "optics" of the AG
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defending the initiative become of significant concern.

2 *E. Intervenors Are Asking for Appointment of Outside Counsel, and Doing So Ensures That*
3 *the Will of the Voters is Protected and Respected*

4 Intervenors are not asking the Court to disqualify the AG from defending the constitutionality
5 and legality of I-976. Rather, Intervenors are asking that mutually agreed upon outside counsel,
6 between Intervenors and the AG, be appointed to advise, collaborate, and work with the AG in
7 zealously advocating for upholding I-976.

8 The following factors make clear that outside counsel should be appointed here:

- 9 1) AG drafted the ballot language for I-976 that this Court primarily based its granting
10 of Plaintiffs' Motion for a Preliminary Injunction;
- 11 2) AG did not move for a change of venue in this matter despite its disparate impact on
12 King County;
- 13 3) AG failed to raise a number of legal issues brought to its attention including the
14 standing of Plaintiffs to challenge I-976 and the need for a bond for a preliminary
15 injunction;
- 16 5) AG's failure and refusal to file Motion for Reconsideration of the Court's granting of
17 Plaintiffs' Motion for a Preliminary Injunction;
- 18 6) AG has an ongoing PDC enforcement lawsuit, and claims resulting therefrom,
19 against I-976 sponsor and promoter Tim Eyman; and
- 20 7) Both Attorney General Bob Ferguson as well as Solicitor General Purcell have
21 repeatedly made "on the record" statements indicating bias and/or prejudice towards
22 Eyman's political activities, and the ballot initiatives that he sponsors and promotes.

23 The present legal challenge to I-976 has attracted significant attention from statewide media

1 over the past month. With the AG's Emergency Motion as well as Pierce County now also likely
2 becoming involved as an Intervenor in this matter as a support of I-976, the importance of this legal
3 challenge to I-976 is only likely to grow over time, attracting attention from elected officials as well as
4 statewide and possibly, national media and interested organizations and parties.

5 Accordingly, it is essential that I-976 be defended by counsel who does so diligently and
6 zealously in order to ensure Washington State voters' trust in democracy and government. What has
7 transpired thus far in this matter has raised significant concerns and questions about the AG's ability to
8 meet these criteria in the absence of the appointment of outside counsel. Consequently, *the*
9 *appointment of outside counsel to assist with defending the constitutionality and legality of I-976 is*
10 *necessary.*

11 VI. CONCLUSION

12 For the foregoing reasons, and under the above-cited authority, Intervenors' Motion to Appoint
13 Outside Counsel should be granted.
14

15 A [Proposed] Order is attached.

16 RESPECTFULLY SUBMITTED on this 4th day of December 2019.

17
18 MDK Law

19 /s/ **Mark Kimball**

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13 *Pursuant to LCR 7, I certify that this Motion is 3,048 words.*
14

DRAFT

HON. MARSHALL FERGUSON
DECEMBER 13, 2019
WITHOUT ORAL ARGUMENT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

GARFIELD COUNTY)
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KING COUNTY; CITY OF SEATTLE;)
WASHINGTON STATE TRANSIT)
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WASHINGTON, and MICHAEL)
ROGERS;)
Plaintiffs,)
v.)
STATE OF WASHINGTON,)
Defendant.)

NO. 19-2-30171-6 SEA

[PROPOSED] ORDER GRANTING
INTERVENORS' MOTION TO
APPOINT OUTSIDE COUNSEL

Intervenors,)

DRAFT

DRAFT

1 THIS MATTER, having come before this Court, and the Court considering the Intervenors'
2 Motion to Appoint Independent Counsel, the record contained therein, and the Declaration of
3 Timothy Donald Eyman and the Exhibits attached thereto,

4 , NOW THEREFORE,

5 This Court otherwise being fully advised in the premises, concludes:

6 INTERVENORS' MOTION TO APPOINT OUTSIDE COUNSEL is GRANTED.

7 TO WIT: The Washington State Attorney General's Office is directed to confer with and
8 agree upon with Intervenors on Outside Counsel to represent Defendant in this matter at the expense
9 of the Washington State Attorney General's Office, subject to the approval of the Court.

10 Done in open court, this ____ day of December 2019.

DRAFT

13 Hon. Marshall Ferguson
14 Judge of the Superior Court

15
16 Order presented by:

17 /s/ **Mark Kimball**

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[PROPOSED] ORDER
GRANTING INTERVENORS' MOTION -3

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